We use candles because they were used in the Inns of Court, ignorant of the fact that those Inns have blazed with electric lights for half a century.

Of the authorities relied on in the case under discussion, few are in point. Many were cases where such evidence was held to have been rightly excluded. Others were cases where other errors obviously prejudicial accompanied the erroneous admission of evidence, resulting in a reversal. *State* v. *Owens,* 109 Iowa 1, cited in the opinion, and *Brann* v. *Campbell,* 86 Ind. 516 and *Bank* v. *Blakeman,* 19 Okla. 106, cited in a text book which the opinion cites, seem to be the only authorities supporting the decision of the Arkansas court, and even these had already been discredited by *Patrick* v. *State,* (*supra*), because they did not involve a statutory rule, and *Patrick* v. *State* was expressly reaffirmed as sound. On the other hand *Green* v. *State* (Tex. Crim. Appeals), 12 S. W. 872, which was also cited in the same text book denounced the doctrine of reversible error in such cases. It clearly was not the force of authority but the instinct for technicality that brought about this decision. It is only an example of a tendency which manifests itself in a thousand ways.

The comfortable indifference of former times has been rudely shaken by the social renaissance ushered in by the great war, and nowhere will reform be more imperatively demanded than in judical administration. There can be no doubt that we are at least a generation behind Great Britain in our legal methods.

Fifteen years ago Mr. Wigmore sounded a warning, which apparently has not yet been generally heeded. Speaking of the American doctrine of granting new trials for error in applying the rules of evidence, he said: "The whole doctrine, no doubt, has its deepest roots in the inveterate and unconscious professional instinct, which grows to venerate unduly the rules that form its daily mental pabulum. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. * * * Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers. * * * We shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial." 1 Wigmore on Evidence §21. We can only hope that the next fifteen years will show more progress in making procedure the servant of justice than the last fifteen have shown. E. R. S.

DAMAGES FOR FRIGHT AND THE PROOF OF PROXIMATE CAUSE.—If a recent case in the Iowa court *infra* is compared with a line of decisions in the equity courts in which nuisances productive of fear have been abated, some light may be thrown on the obscure interlacing of the two doctrines suggested by the caption of this note. In *Holdorf* v. *Holdorf,* (Iowa, 1918), 169

N. W. 737, the plaintiff testified at the trial that the defendant "came up toward me, and he did as if he was to strike me." He did not touch her, but she later suffered a miscarriage accompanied by severe pains and lacerations. *Held,* she may recover in an action of assault for resulting injuries—the act of the defendant being willful. This is the stock situation of recovery given where there is fright without physical impact but resulting in physical injury and might have been settled on the precedent of *Green* v. *Shoemaker and Co.,* 111 Md. 69, 8 MICH. LAW REV. 44; but the court prefers to lay stress on its own precedent of *Watson* v. *Dilts,* 116 Iowa 249, in which the willfulness of the tort is the foundation for the recovery rather than any trespass to the person proved by physical results.

One of the best of the extra-judicial discussions of this oft-litigated question is the article by Professor Bohlen in 41 AMER. LAW REG. 141 on the "Right to Recover for Injury Resulting from Negligence Without Impact," which appeared shortly after the decision in *Dulieu* v. *White,* (1901), 2 K. B. 669, and approves of the doctrine there laid down. He has concluded that fright may be a link in the chain of causation leading to actionable physical injury but that fright or mental suffering alone was not legal damage at common law. "Material, tangible injury had to be shown before a recovery could be had in an action for negligence." See also the excellent note in 3 L. R. A. (N. S.) 49.

It is submitted that this doctrine though technically correct and often asserted in judicial utterances is doubtful in experience and surely not followed by the courts as a matter of fact. The common law has from an early day given a recovery for mental suffering where the proximate cause was clear, although the courts have veiled their real intent by branding these cases as exceptions or by saying that the recovery was really for something else. The action of assault where there is no physical impact recognizes a recovery for fright although only nominal damages are given. *Beach* v. *Hancock, 27* N. H. 223. The trespass to the person here is nothing more than an apprehension of bodily injury, and where the fright was serious, substantial damages were recoverable. *Small* v. *Lonergan,* 81 Kan. 48, 25 L. R. A. (N. S.), 976. Even though courts have insisted on accompanying physical impact they have not required it in tort actions where the wrong was willful—on the theory, it seems, that aggravated compensatory damages were warranted in such cases. *Craker* v. *Ry.* (1875), 36 Wis. 657; *Spade* v. *Lynn,* (1897), 168 Mass. 285, a much quoted dictum. This is in effect giving a recovery for mental suffering alone under a clear cut exception. In the action for breach of contract of marriage, in which the feelings are manifestly the subject matter of the contract, the recovery for mental suffering is undisputed. Though called an exception it is more correctly a situation where the courts are convinced that the suffering is undoubtedly a proximate consequence of the breach. It was suggested in 8 MICH. LAW REV. 44, cf. *Ward* v. *West Jersey Ry.,* 65 N. J. L. 385—that the chief trouble of the courts, which has caused the bewildering contrariety of decisions, was largely a difficulty of proof of the proximate relation between the wrongful act alleged and the result complained of. The courts start with the proposition that there

is no recovery for mental suffering at common law, and when they begin to depart from this pronouncement, because of the social demand that manifest wrongs shall be redressed, they hold on to some well recognized cause of action at common law to which the recovery for mental suffering may be added. In other words they deny a recovery and allow it in the same breath where the demand for a recovery is imperative.

There are, indeed, numerous situations where a direct recovery is actually given through such indirect means. In the action of seduction the chief element of damage is mental suffering in the form of humiliation and parental anxiety and yet recovery has been based on the fiction of loss of service where that service was no more than serving a cup of tea. *Kendrick* v. *McCrary,* (1852), 11 Ga. 603 and the case therein cited. Here, too, as in the breach of contract of marriage, it is undeniable that the gist of the action, mental suffering, is the proximate consequence of the breach. Most of the jurisdictions have allowed a recovery where the fright has followed a violation of one of the constitutional rights of life, liberty, or property—such violation giving a right to an independent cause of action. Where the courts were convinced that a serious injury traceable to a certain cause or class of causes had in fact been occasioned by the mental suffering inflicted, they contrived a recovery by relying on or straining some recognized legal right or concocting some new right, the violation of which could be regarded as the proximate cause of the suffering; the damages for the suffering could thus be added into the verdict. The purpose, it would appear, was to allow recovery and at the same time to limit it to certain specified cases so as to shut out the possibility of fraudulent claims. In *Lesch* v. *Ry.,* 97 Minn. 503, the agents of the defendant while committing a trespass on the premises of plaintiff's husband, frightened the plaintiff. The court allowed her a recovery for the fright because it was accompanied by a willful invasion of her homestead; and created, it would seem, a new action to suit the case—'*trespass quare homesteadium fregit.*' Compensation was likewise allowed for the mental suffering endured consequent on the mutilation of the body of the plaintiff's deceased husband. Recovery was founded on the willful invasion of the plaintiff's right to the disposition of her husband's body—a right which is, to say the least, a much disputed one. The court realized that the usual difficulty of ascertaining the cause was absent in such a case. MITCHELL J. said: "That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument.' Nevertheless the court preferred to say that the violation of the right was the proximate cause of the suffering rather than the act of mutilation itself. *Larson* v. *Chase,* 47 Minn, 307. Similarly the court in the principal case needlessly introduced the element of willfulness as a reason for recovery. Then there are the troublesome telegraph cases, in which the plaintiff endures sorrow because unable to attend a funeral of a near or dear relative, through the neglect of the company to deliver or transmit promptly a telegram announcing the death. *Mentzer* v. *W. U. Tel. Co.,* 93 Ia. 752. The courts have struggled hard to find a legal hook in these cases. They have given the sendee a right *ex contractu* as a third party beneficiary

to a contract by the terms of which the company is warned that suffering will follow a breach; and a right *ex delictu* has been found based on the company's public duty. But it should be noted that as the relatives are more distant from the plaintiff the courts are less inclined to rely on their creative faculties. Thus, where the plaintiff's sorrow was caused by reason of inability to attend his mother-in-law's funeral, recovery was denied, although the court did not admittedly base its opinion on the popular conception of this hypenated relationship. The case is of value as pointing out that the courts as a fact always look to see if there is a proximate cause before the legal hooks are used to help out the situation. *Rowell* v. *W. U. Tel. Co.*, 75 Tex. 26. The contrary view is comprehensively expressed in *W. U. Tel. Co.* v. *Choteau*, 28 Okla. 664.

An examination of a few of the illogical conclusions reached by the courts will point out what the courts have come to in trying to put artificial restrictions on this inevitable demand for recovery. In *Victorian Ry.* v. *Coultas*, L. R. 13 App. Cases, 222, the court refused to allow recovery for fright with physical result because there was no physical impact; i. e., the direct trespass to the person by the wrongful act was held to be a necessary hook to which the recovery for fright might be attached. In *Dulieu* v. *White* (*supra*), the court, disapproving of the *Victorian Ry.* case, held that the physical result was sufficient for the purpose though there was no physical impact. In *Mitchell* v. *Rochester Ry.*, 151 N. Y. 107, the court insisted that the previous impact was necessary and, by what seems to be a logical fallacy, concluded that physical result could under no circumstances be a legal consequence of fright or be used as a hook to which to tie recovery. The court starts with the basic assumption that there is no recovery for fright at common law therefore, "it is difficult to understand how a defendant would be liable for its consequences." The argument is: fright as a cause of action is zero, but *ex nihilo nihil fit* (Cf. LUCRETIUS, DE RERUM NATURAE, 150, 205), zero can only produce zero, therefore the consequences of fright are zero, Q. E. D. This, too, even when the consequences have been plainly proved in court. *Dulieu* v. *White* fortunately disclosed the incorrectness of such a conclusion and specifically rebutted the *Mitchell* case which had been urged by counsel. The principal case, in disregard of *Dulieu* v. *White*, fell victim to this logic. The action was for damages for the consequences of fright and there is nothing in the case to show that the plaintiff was asking for a recovery for the fright causing the miscarriage. Yet the court went to the trouble of finding out first that fright caused by a willful act was recoverable. If right justified recovery so did its consequences, and the objection of the *Mitchell* case could not hold. But would it not have been more correct for the court to have said simply that fright can be a link in the chain of causation. Indeed, Bohlen explained *Wilkinson* v. *Downton* not on the theory of willfulness but on the principle that "the defendant intended to create a fright so severe as to be obviously calculated to cause serious physical results." Here again it is evident that the trouble has been caused by the failure to take a proper attitude on the question of proximate cause.

The law courts have a lesson to learn from the common sense attitude of

the American equity courts which have enjoined the erection of hospitals as nuisances because of the consequent fear of contagion produced in the minds of the residents, whose comfortable enjoyment of the premises was thus curtailed. And though the fear was only a subjective one, wholly unwarranted by science, the courts have not withheld the injunction. In *Everett* v. *Paschall,* 61 Wash. 47, where the complainants said they feared infection from a tuberculosis hospital, the court said: "The question is not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and the conduct of men. Such fears are actual and must be recognized by the courts as other emotions of the human mind." To prove the actuality of the fear the court cited the treatises of pscychologists. The case does not stand alone but is supported by a group of American decisions cited therein. The English courts, however, have followed a decision of Lord Hardwicke in 3 Atk. 750, that "the fears of mankind, though they may be reasonable ones, will not create a nuisance." This is repudiated by the Washington court. Though there is no question of damages in the injunction cases, they are pertinent in our inquiry since they show that the court took mental disturbance into account as an element of legal injury where the proximate cause was clear and the injury was undoubted.

Just so soon as the courts drop their theorizing about the existence or non-existence of a right to recover at common law for mental suffering and look at the problem in the light of the actuality of the cause and the consequence, then all trouble arising from arbitrariness and needless pursuit of fiction will be obviated. At one time there was even doubt whether damages for mental suffering were recoverable even though accompanied by physical impact. But as soon as the courts realized that the suffering actually existed they began to allow recovery—as Lord Wensleydale said in *Lynch* v. *Knight,* 9 H. L. Cas. 577: "where a material damage occurs and is connected with it, it is impossible a jury in estimating it should altogether overlook the feelings of the party interested." In *Merill* v. *Los Angeles Gas Co. etc.,* 158 Cal. 499, 513, the court allowed recovery for mental worry caused by disfigurement of the plaintiff's face so as to make him feel that he would be a source of ridicule to his fellows. The court said: "The whole matter possesses more academic than practical significance. * * * At the suggestion of defendant's counsel, the jury is instructed to disregard all elements of mental suffering except that arising solely from physical pain. Can the jury do it? Will the jury do it? It is mere self-stultification to believe that it will do other than to make up its verdict under the rule, which while not one of law, is one of well nigh universal conduct,—the rule of 'Put yourself in his place.'" However, it has been indicated that the proximate cause is equally evident and with equal force a fact before the mind of the jury where there is no accompanying physical impact. In such cases the courts have actually allowed a recovery although the true nature of the action was hidden behind a recovery for something else. In Massachusetts there must be physical impact but in *Driscoll* v. *Gaffey,* 207 Mass. 102, there was no more than a scintilla of evidence of injury from without. This case was forcefully

criticized by the court in *Spearman* v. *McCrary,* 4 Ala. App. 473, 482; "the rule of non-liability which is claimed to exist in such a case does not involve the denial of the right to be compensated in damages for an injury caused by fright, but merely has the effect of making the right to recover such damages dependent upon the existence of a feature of wrongful occurrence which confessedly may be quite trivial and amount to no more than a merely technical breach of duty, resulting in no appreciable harm to him, besides being in itself a thing the existence of which may often be shown by evidence even more readily fabricated and less easy to refute than that in reference to the injury attributable to mental fright or shock." The same criticism would apply against the case which said that "dust in the eyes" would be sufficient physical impact. *Porter* v. *Lackawanna Ry.,* 73 N. J. L. 405. In a word, have not the courts actually allowed recovery for fright in the cases of nominal physical impact and the cases of willful or intentional fright? The courts have admitted that "wounding a man's feelings is as much actual damage as breaking his limbs." *Head* v. *Ga. Pac. Ry.,* 79 Ga. 358; and that "it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." *Douglas* v. *Stokes,* 149 Ky. 506, 509. Since, as the court says in *Spearman* v. *McCrary* (*supra*), "we know of no legal reason for denying that any agency is the proximate cause of a given result when it is as a matter of fact," then why not throw aside fictions and regard mental suffering standing alone as a legal wrong on which an action for damages may be based. But see *St. Louis Etc. Ry.,* v. *Taylor,* 84 Ark. 42. A. J. L.

Implied Condition Involving Impossibility of Performance.—Early in 1914 the defendants contracted to sell to the plaintiffs a quantity of Finland birch timber. The practice was to send the timber direct by sea from Finnish ports. Before any timber was delivered the war broke out and the presence of German warships in the Baltic made the direct shipment by water impossible. The contract contained no war, *force majeure* or suspension provision. *Held,* that the contract was not dissolved, and the defendants were liable for damages for non-delivery of the timber. *Blackburn Robbin Co., Lim.* v. *Allen & Sons, Lim.* (1918) 87 L. J. K. B. 1085.

The doctrine of implied conditions has been brought before the English courts more prominently since the outbreak of the war than ever before, by reason of the many causes of impossibility of performance produced by the war. On the whole it is clear that the courts of England have not allowed themselves to be drawn away from established rules in spite of the great pressure of the war emergency, thus exhibiting in a striking way the judicial poise which has always been characteristic of British judges.

The leading recent case was *Krell* v. *Henry* [1903] 2 K. B. 740, which held that a contract for hiring a flat on Pall Mall for the two days on which it was announced that the coronation procession would pass along Pall Mall, was subject to the implied condition that the procession should take place, though nothing was said about it in the contract. The language of that case